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IN THE

Supreme Court of the United States

OCTOBER TERM. 1961.

No. 270

EDWARD T. HULSON AND WALTER A. CHRISTENSEN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

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1. Where the Seventh Circuit Court of Appeals decided in accord with the decisions of other circuits and in compliance with decisions of this Court that the time limitations of certain Federal Procedural Rules are jurisdictional and cannot be enlarged should certiorari be granted?

2. Where it is admitted that no timely post-trial motions were made pursuant to the provisions of the Federal Rules, and that consequently the Appeal was not perfected in time pursuant to those Rules, should this Court grant

certiorari for the purpose of entertaining a plea to change matters of record so that the moving party be deemed to have complied with jurisdictional requirements?

3. Should certiorari be granted to review the decision of the Court of Appeals that "ignorance of the rules resulting in an agreement for an unauthorized extension of time cannot serve to furnish ground for relief under Rule 60(b), under the facts before us in this appeal"?

4. Should this Court grant certiorari to review a policy issue inherent in the Federal Rules of Civil Procedure or leave such a determination to the rule-making process.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

As indicated in petitioners' brief, p. 2, Rules 6(b), 59(b) and 60(b) of the Federal Rules of Civil Procedure are involved. In addition, however, respondent submits that Rules 50(b), 59(d), (e) and 73 (a) are also involved and are reproduced in the Appendix herein, *infra*, p. .....

STATEMENT.

The facts as stated in Petitioners' brief are not controverted by us, except for one important factor: no motion for a new trial or judgment notwithstanding the verdict was filed within the ten-day period following the entry of judgment. Petitioners, plaintiffs below, did seek permission to amend their motion for a new trial on June 17, 1960, but at that time they had filed no motion, hence there was nothing to amend. The colloquy set out on pages 3 and 4 of petitioners' brief (Appellants' App., pp. 122, 123) shows that Mr. Patterson, the plaintiffs' attorney, stated: "I am merely asking for an extension of time in which to file a motion for a new trial." Furthermore, there is no doubt that the plaintiffs' motion was so understood by the Trial

Court, for the order entered on June 17, 1960, read as follows (Appellants' App. 125):

> "Ordered that plaintiffs' time in which to file their motion for judgment not withstanding the verdict, or, in the alternative for a new trial be and is hereby extended for a period of ten days, briefs of counsel to follow."

The opinion of the Trial Court also discloses that there was no ambiguity as to the nature of plaintiffs' motion. The Court stated (Appellants' App. 18):

> "Here the record affirmatively shows that no such motion was made, either orally or in writing. This record affirmatively shows that the Court attempted to grant the plaintiffs an extension of time in which *to make such motions*. The mere motion of an extension of time in which to make the motion excludes any thought of a proper motion being made within the ten-day period." [Emphasis by the court.]

The Petitioners also contend on pages 4 and 5 of their brief that they were discouraged from filing their post-trial motions on June 17, 1960, because of the Court's preoccupation with other matters. Here again, the colloquy contained on pages 3 and 4 of their brief (Appellants' App. 122, 123) shows that the trial judge stated he would be available to hear the motion that same afternoon. Mr. Patterson, plaintiffs' attorney, responded that he was "merely asking for an extension of time to file my motion for a new trial." This exchange demonstrates that counsel for plaintiffs never intended to and did not file his motion within ten days of the entry of judgment.

The post-trial motions were not filed until June 27, 1960, twenty days after judgment was entered on the verdict. (Appellants' App., p. 7.) These motions were stricken for being untimely, on September 7, 1960, pursuant to

Federal Rules of Civil Procedure 50(b), 59(b) and 60(b) (Appellants' App. 15-20.)

Plaintiffs filed their Notice of Appeal on October 4, 1960, almost four months after judgment was entered on the verdict (Appellants' App. 21), stating that they were appealing from:

> "1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;
>
> 2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;
>
> 3. The order extending for a period of ten days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960;
>
> 4. The order allowing the defendant's motion to strike the motion of the plaintiffs for judgment notwithstanding the verdict or in the alternative for a new trial, and striking the plaintiffs' said motion, entered in this action on September 7, 1960."

Our motion to dismiss paragraphs 1, 2, and 3 of the Notice of Appeal was continued without prejudice, to be taken with the case on the merits of paragraph 4 by order of the Court of Appeals, dated November 29, 1960.

On April 24, 1961, the Court of Appeals pursuant to Federal Rules of Civil Procedure 50(b), 59(b), 73(a) and 6(b) dismissed the appeal as to the issues raised in paragraphs 1, 2, and 3 of the Notice of Appeal for lack of jurisdiction, and affirmed the order of the Trial Court complained of in paragraph 4.

REASONS FOR DENYING THE WRIT.

1. Plaintiffs' post-trial motion filed twenty days after the entry of judgment was stricken by the Trial Court pursuant to the time limitations of Rules 50(b) and 59(b) and the prohibition against their extension contained in Rule 6(b). As indicated in our Statement of Facts, plaintiffs' post-trial motion was not filed within the mandatory ten-day period of these rules. The motion of plaintiffs, twenty days after the entry of judgment, was therefore a nullity and properly stricken from the record. Rule 73(a) states that the "running of time for appeal is terminated by a timely motion." The courts have consistently held that a motion which is not timely will not serve to terminate the time for appeal.

> *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211 (1952).
>
> *Fine* v. *Paramount Pictures*, 181 F. (2d) 300 (7th Cir., 1950).
>
> *Raughley* v. *Penn. R. R. Co.*, 230 F. (2d) 387 (3rd Cir., 1956).
>
> *Steward* v. *Atlantic Refining Co.*, 235 F. (2d) 570 (3rd Cir., 1956).

The Court of Appeals accordingly held that Rule 6(b) prohibited any enlargement of the time limitations prescribed in Rules 50(b), 59(b) and 73(a). (Petitioner's App., pp. 17-19.) A basic principle of Federal Civil Procedure was thereby correctly decided in compliance with decisions of this Court. *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952); *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, *supra*, and *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). In *Johnson*, *supra*, a verdict was returned for the plaintiff and judgment was entered. Within ten days after reception of the verdict,

defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the pre-verdict motion for dismissal and for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

> "On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212. We repeated that construction of the rule in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and re-emphasized it in *Fountain* v. *Filson*, 336 U. S. 681."

In *F. T. C.* v. *Minneapolis Honeywell Regulator Co.*, *supra*, this Court commented on the policy consideration dictating a strict enforcement of the time limitations on review at page 213:

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean t encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review."

United States v. *Robinson*, *supra*, dealt with the appeal periods prescribed by Rules 37(a) (2) and 45(b) of Federal Criminal Procedure. Rule 37(a) (2) provides a ten-day period for filing a notice of appeal following a judgment in a criminal case. Rule 45(b) is similar to Civil Procedure Rule 6(b) in that it prohibits the enlargement of the time limitations on post trial motions and the appeal period. This Court held that by virtue of Rule 45(b) the ten-day appeal period of Rule 37(a) (2) could not be enlarged. In *Robinson*, as in the instant case, "excusable neglect" was urged as a ground for relaxing the provisions of these Rules. This Court rejected this ground as a basis for circumventing the Rules and drew a direct analogy to Civil Procedure Rule 6(b) at pages 228 and 229:

> "But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. When the original Criminal Rules were being prepared, the limiting clause of Rule 6(b) of the Federal Rules of Civil Procedure stated: '* * * but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.' It has consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45(b)."

This Court then concluded by noting that the jurisdictional nature of these Rules should not be altered by judicial decision. It stated at pages 229 and 230:

> "That powerful policy arguments may be made both for and against greater flexibility with respect to the

time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United States* v. *Isthmian S. S. Co.*, 359 U. S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it."

The Circuit Courts of Appeal have followed the decisions of this Court in holding that the time limitation for post-trial motions and the appeal period are jurisdictional in nature and cannot be extended. *Fine* v. *Paramount Pictures*, 181 F. (2d) 300 (7th Cir., 1950); *Waddell* v. *Chicago Land Clearance Comm.*, 206 F. (2d) 748 (7th Cir., 1953); *Raughley* v. *Penn R. R. Co.*, 230 F. (2d) 387 (3rd Cir., 1956); *Brest* v. *Philadelphia Transp. Co.*, 273 F. (2d) 22 (3rd Cir., 1959); *Knowles* v. *U. S.*, 260 F. (2d) 852 (5th Cir., 1958); *Steward* v. *Atlantic Refining Co.*, 235 F. (2d) 570 (3rd Cir., 1956); *Virginia Land Company* v. *Miami Ship Corp.*, 201 F. (2d) 506 (5th Cir., 1953); *Randolph* v. *Randolph*, 198 F. (2d) 956 (D. C., Cir., 1952); *Deena Produce Co.* v. *United Brick and Clay Workers*, 195 F. (2d) 612 (6th Cir., 1952), cert denied, 344 U. S. 822; *Jusino* v. *Morales and Tio*, 139 F. (2d) 946 (1st Cir., 1944).

As indicated above, this Court has denied certiorari in *Deena Produce Co.* v. *United Brick and Clay Workers*, *supra*, which involved the same procedural issues.

We submit that the preceding authorities demonstrate

that this Court has on numerous occasions clearly decided the issues involved in this petition. The decision of the Court of Appeals in this case complied with those decisions. In addition, decisions from Courts of Appeals of other Circuits are in accord. Under these circumstances this Court should deny the writ of certiorari.

The cases cited by petitioners do not support their assertion that a conflict exists between the Circuits.

In *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. (2d) 274 (9th Cir., 1959), cert. den. 322 U. S. 919, the jurisdictional question was never raised until the Court of Appeals had entertained the case on the merits and this Court had denied certiorari. The jurisdictional question was then raised in the Court of Appeals for the first time, eleven months after that Court had heard and decided the case on the merits. The Court then refused to reconsider the question of jurisdiction which it held had become *res judicata*, even if it were decided incorrectly. The Court stated at p. 277:

> "Since the question of this court's jurisdiction of the appeal was thus an issue in the case, the reversal of the judgment below was a tacit determination of the court's jurisdiction and a final adjudication of that issue. If this final adjudication was erroneous, it was subject to correction upon review in a higher court, or upon rehearing in this court. But such a judgment, whether erroneous or not, becomes *res judicata*. *Stoll* v. *Gottlieb*, *supra*."

The case is, therefore, easily distinguishable. Respondent, herein, raised the jurisdictional issue with the Court of Appeals at the earliest opportunity by motion to dismiss. (Petitioners' App., p. 17.)

In *Daulton* v. *Southern Pacific Co.*, 228 F. (2d) 103 (9th Cir., 1955), cert. denied, 352 U. S. 1005, the Appellate Court did not indicate whether it approved of the Trial Court's

action in granting relief under Rule 60(b). This was clearly stated in Judge Pope's concurring opinion at p. 103:

> "I concur in the foregoing and in doing so note that whether it was proper to grant relief under Rule 60(b) is immaterial here;—what is material is that the trial court did so."

Witt v. *Merrill*, 208 F. (2d) 285 (4th Cir., 1953), is inapplicable. In that case a motion for a new trial was made immediately after the verdict was returned.

2. The Courts below properly refused to apply Rule 60(b) under the facts of this case.

As has been noted, Rule 6(b) provides that a court may not extend the time for taking any action under Rules 50(b), 59(b), (d) and (e), "except to the extent and under the conditions stated in them." These rules contain no conditions for their extension and for this reason their time provisions have been held to be jurisdictional.

Rule 60(b) makes express reference to Rule 59(b) in subparagraph (2) and provides for relief from a final judgment where there has been "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." No reference is made anywhere in Rule 60(b) to Rule 50(b). The fact that express reference is made to Rule 59(b) indicates that Rule 60(b) was not intended to apply to extend the time limitations of Rule 50(b) or 59(b) except under the very narrow circumstances outlined in 60(b) (2) dealing with newly found evidence. If all of the sub-sections of 60(b) had been intended to supplement the post-trial motion procedure of Rules 50(b) and 59(b), there would have been no purpose in specifying a single ground, newly found evidence, for relief from a judgment after the ten-day period has elapsed.

The only ground relied on by counsel for petitioners to invoke Rule 60(b) in their motion before the Trial Court

was that through "inadvertence and mistake" they overlooked the provisions of Rule 6(b). (Appellants' App. 132.)

It is apparent that if petitioners prevail on this theory, the provisions of 6(b) would be emasculated. Obviously, every litigant who failed to comply with the provisions of these rules could then circumvent them by the naked assertion that he was unaware of or overlooked them. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

Indeed one can assume that the limitations of 6(b) on extending the time for Rules 50(b) and 59(b) were intended to apply primarily where counsel was unaware of them. Obviously, a litigant desiring a new trial would not wait beyond the ten-day period if he knew that it was jurisdictional. The fact that he does not know that it is jurisdictional, however, does not alter the nature of the time limitations imposed.

It is significant that an analysis of the cases cited by appellants reveals that they are not in point, and in some instances hold directly contrary to the proposition for which they are cited.

In *F. D. I. C.* v. *Alker*, 234 F. (2d) 113, 116 (3rd Cir., 1956), a motion was made under Rule 60(b) on the ground of newly discovered evidence. The Court refused to consider the motion or the nature of the new evidence. Here, our opponents made no contention that they based their motion under Rule 60(b) on "new evidence".

In *Sternstein* v. *"Italia"-Societa*, 275 F. (2d) 503 (2nd Cir., 1960), a motion for a new trial was made within ten days of the Court's findings of fact in a bench trial.

In *John E. Smith & Sons Co.* v. *Lattimer Foundry*, 239 F. (2d) 815 (3rd Cir., 1955), the opinion of the trial court contains a comprehensive analysis of Rule 60(b), 19 F. R. D. 379 (M. D. Pa., 1956). A motion for a new trial which had been filed but not served within ten days was stricken pursuant to Rule 59(b). The court stated at 19 F. R. D. 381:

> "The provision of Rule 59(b) requiring that a motion for a new trial be served not later than ten days after entry of judgment is mandatory. Cf. *Greenwood* v. *Greenwood*, 3 Cir., 1955, 224 F. 2d 318, 319. Rule 6(b) prohibits any enlargement of the time. Cf. *Leishman* v. *Associated Wholesale Electric Co.*, 1942, 318 U. S. 203, at page 206, 63 S. Ct. 543, 87 L. Ed. 714; *Safeway Stores, Inc.* v. *Coe*, 1943, 78 U. S. App. D. C. 19, 136 F. 2d 771, at page 775, 148 A. L. R. 782, 'We think that the purpose of Rule 6(b), which forbids the court to enlarge the time for taking any action under Rule 59 was to divest the court of jurisdiction to entertain a motion * * * filed out of time.' *Raughley* v. *Pennsylvania R. Co.*, 3 Cir., 1956, 230 F. 2d 387, at page 390, '* * * 6(b) renders a court powerless to entertain such motions when untimely made' and where the court acts contrary to such a mandate its action 'must * * * be considered as a nullity.' Id. Merely filing is not enough, cf. *Steward* v. *Atlantic Refining Co.*, 3 Cir., 235 F. 2d 570."

There the defendant, however, moved for relief under Rule 60(b) and the court in treating this motion stated at pages 383 and 384:

> "Since there are no allegations in the motion or petition seeking relief under Rule 60(b), see and cf. note 5, *supra*, we can only assume that defendant's counsel rely upon mistake, inadvertence, or excusable neglect. * * *

"Vol. 10, Cyc. of Federal Procedure, Ch. 37, sec. 37.01, p. 292, states, 'No one has ever fathomed the exact significance of the phrasing. 'Mistake' is rarely an excuse in the law and is generally frowned upon; 'surprise' is scarcely ground for a continuance, unless well justified; 'inadvertence' means unpreparedness, which is certainly no excuse in earlier stages of a lawsuit; and 'excusable neglect' is a self-nullifying term, because that which is adequately excusable is not neglect.'

"Mr. Justice Frankfurter in *Klapprott* v. *United States*, *supra*, 335 U. S. at page 630, 69 S. Ct. at pages 397, 398, suggests that 'neglect' in the context carries the idea of negligence and not merely non-action.

"Ordinarily to obtain relief one must be free from negligence. *Simonds* v. *Norwich Union Indemnity Co.*, 8 Cir., 1934, 73 F. 2d 412, at page 415; *Continental National Bank* v. *Holland Banking Co.*, 8 Cir., 1933, 66 F. 2d 823, at page 829; *Knox County* v. *Harshman*, 1890, 133 U. S. 152, at page 154, 10 S. Ct. 257, 33 L. Ed. 586, 'Relief is denied from error resulting from gross carelessness.' 7 Moore op. cit. *supra*, p. 233, citing *Greenspahn* v. *Joseph E. Seagram & Sons Inc.*, 2 Cir., 1951, 186 F. 2d 616, at p. 619, 'gross carelessness'; 5 Williston on Contracts, Rev. Ed., sec. 1427, p. 3997; *Fischer* v. *Dover Steamship Co., Inc.*, 2 Cir., 1955, 218 F. 2d 682, 683.

"Mr. Justice Minton in *Ackermann* v. *United States*, *supra*, 340 U. S. at page 198, 71 S. Ct. at page 211, speaking for the court states that there 'must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.' See *Kahle* v. *Amtorg Trading Corp.*, D. C. N. J., 13 F. R. D. 107; *In re Riedner*, D. C. E. D. Wis., 94 F. Supp. 289; *Ledwith* v. *Storkan*, D. C. D. Neb., 2 F. R. D. 539; *Baron* v. *Leo Feist, Inc.*, 2 Cir., 1949, 173 F. 2d 288, 290. See and cf. cases, *supra*, note 8 and see 7 Moore, op. cit. *supra*, sec. 60.10(7), pp. 17 to 21, discussing possible relief under the California decisions, '* * * defaults would not be set aside where dates for filing pleadings were confused by counsel.' pp. 19-20.

"* * * If relief were afforded in the present case, it would render the prohibition of Rule *(b) meaningless. A party is not relieved from the duty to take legal steps to protect his interests. 3 Barron and Holtzoff, Federal Practice and Procedure, Pocket Part, sec. 1329. 'Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity.' 7 Moore, op. cit. *supra*, p. 224.

"In view of the foregoing, we were in error in not granting plaintiff's motion to strike the motion for a new trial."

We submit that this case correctly disposes of petitioners' argument for the application of Rule 60(b).

3. Petitioners urge the court to treat their motion to extend the time for filing their post-trial motion as a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Petitioners have in effect asked this Court to change matters of record. It is admitted that no motions to alter the judgment in any way were made within the ten day period.

A similar request was made in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952), where a verdict was returned for the plaintiff and judgment was entered. Within ten days after reception of the verdict, defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the preverdict motion for dismissal and for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

"Although this respondent made several motions it

> did not as the rule requires move within ten days after verdict 'to have judgment entered in accordance with his [its] motion for a directed verdict.' We are told, however, in respondent's brief that its motion to set aside the verdict 'was intended to be a motion for judgment in its favor or for a new trial' and that '[o]bviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial.' *The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants.* Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel. *Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict—not one to enter judgment notwithstanding the verdict.*" [Emphasis supplied.]

Thus, as indicated by this Court, plaintiffs' motion in this case should be treated as nothing more than what it actually and admittedly was, one for an extension of time to file its post-trial motions. Plaintiffs' motion to "amend" their motion for a new trial filed on June 16, 1960, was meaningless since at that time there was no motion on file and hence nothing to amend. This paper did not purport to be a motion for any kind of relief from the judgment of June 7, 1960; a fact in itself fatal to the contention of the plaintiffs.

It cannot be treated as a motion for a new trial for an additional reason which is basic to Federal Procedure. It did not specify any grounds for relief. In *Fine* v. *Paramount Pictures*, 181 F. (2d) 300, 303 (7th Cir., 1950), this court stated in determining the effect of an oral motion

for a new trial made within the ten-day period but which did not specify grounds:

> "Rule 7(b), on the general requirements as to motions, does make provision for oral motions 'made during a hearing or trial.' Even if we could say that this general provision now authorizes an oral motion for a new trial (although Rule 59 seems to clearly require a written motion) and even if we could say that an oral motion made at the conclusion of the entry of the judgment was 'during the trial,' we would still be required to hold that the plaintiff's motion for a new trial in this case was insufficient.
>
> This is true because the record fails to show any reasons which were assigned for the motion within ten days after the entry of the judgment. If reasons for the oral motion were first assigned and made known to the court and the defendants on December 9, when the motion was argued and denied, they came too late to toll the time for taking an appeal. The trial court did not have jurisdiction to hear and pass on reasons for a new trial which were not assigned and served on the defendant within ten days after the entry of the judgment."

4. The petitioners do not deny that we acted in good faith in acquiescing to the Court's order in extending the time for the filing of the post-trial motions. (Petitioners' brief, p. 2.) An argument on this point, however, is moot since the courts have held that even where there is an express stipulation of counsel, the trial court cannot extend the jurisdictional periods of the Rules involved in this case.

In *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 130 F. (2d) 185, 187 (3rd Cir., 1942), the court in discussing the power of counsel to extend by stipulation the time provisions of the federal rules, stated:

> "However, in addition to implications and technical rules of construction, there exists a sound policy for denying litigants the privilege of enlarging time

for pleading by mere stipulation. The guiding mandate of the Federal Rules is that 'They shall be construed to secure the just, speedy, and inexpensive determination of every action.' As previously noted, the express provisions in the Rules allowing stipulations aim at this goal. But, if the practice followed by the parties in this case were permitted, the purpose of the Rules would be departed from. Litigants could, as they have done in the past, materially prolong the time for the trial of a case to suit their convenience and interests. The courtesies extended by counsel in such instances, although commendable as professional comity cannot be permitted to interfere with what we think the Rules require."

This case was cited with approval by Moore in his treatise on *Federal Practice* (2nd Ed. 1954), who stated at ¶ 59.09[1], page 3847, footnote 28:

"Rule 6(b) clearly prohibits court enlargement of the time period in the interest of judgment finality and in preventing an undue extension of the time for appeal. ¶¶6.01[5], [6], 6.07, *supra*. It is not justifiable to allow the parties, without any court supervision, to thwart that policy, when they cannot, even with court leave, do so. And, except as provided in Rule 59(c), see P. 59.10, *infra*, the parties may not extend the time to perform acts under the Rules by a mere stipulation. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.* (C. C. A. 3rd, 1942), 130 F. (2d) 185, 6 F. R. Serv. 6b.12, Case 1 (see ¶ 6.08, *supra*)."

In *Slater* v. *Peyser*, 200 F. (2d) 360 (D. C. Cir., 1952), the court stated at page 361:

"Counsel's stipulation of December 18 was not intended to extend the 10-day time limit fixed by Rule 59(b) for filing a motion for rehearing or for a new trial. Moreover, it could not do so. 'An agreement with opposing counsel * * * is not an acceptable reason for failure to comply with the rules of court or, specifically, for failure to move in proper time for exten-

sions of time as provided in such rules.' *Citizens' Protective League, Inc.* v. *Clark*, 85 U. S. App. D. C., 283, 284, 178 F. (2d) 703, 704."

Other decisions to the same effect are:

John E. Smith's Sons Co. v. *Lattimer Foundry and Mach. Co.*, 19 F. R. D. 379 (D. C. Pa., 1956). Aff'd 239 F. (2d) 815 (3rd Cir., 1956).

United States v. *Mayer*, 235 U. S. 55 (1914).

An analogy may also be drawn to the time period within which an appeal may be taken. It is uniformly held that such period is jurisdictional and may not be extended or waived by the parties. *Martin* v. *Hess*, 146 F. (2d) 360 (6th Cir., 1949).

CONCLUSION.

Certiorari should be denied because the decision of the Court below followed decisions of this Court in enforcing basic provisions of the Federal Rules of Civil Procedure. The essence of petitioner's complaint is that he did not follow the Rules because he did not read them. Compelling policy considerations of federal procedure demanding a fixed point of time denoting an end to litigation necessarily prevailed in this situation. Certiorari should not be granted to review the policy issue drafted into these Rules but should be left to the rule-making process.

Respectfully submitted,

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APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE CITED.

Rule 50.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 73.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed: The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.